EXHIBIT R

IN THE UNITED STATES DISTRICT COURT

IN AND FOR THE DISTRICT OF DELAWARE

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THOMAS A. EAMES, on behalf of themselves and all others similarly situated; ROBERTA L. EAMES, on behalf of themselves and all others similarly situated; TAMMY EAMES, on behalf of themselves and all others similarly situated;	:	CIVIL ACTION
Plaintiffs,	:	
v	:	
NATIONWIDE MUTUAL INSURANCE COMPANY,	:	
Defendant.	:	NO. 04-1324 (KAJ)

- - -

Wilmington, Delaware
Friday, August 5, 2005 at 10:00 a.m.
TELEPHONE CONFERENCE

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BEFORE: HONORABLE KENT A. JORDAN, U.S.D.C.J.

- - -

APPEARANCES:

MURPHY, SPADARO & LANDON
BY: JOHN S. SPADARO, ESQ.

Counsel for Plaintiffs

SWARTZ CAMPBELL, LLC
BY: NICHOLAS E. SKILES, ESQ.

and

APPEARANCES: (Continued)

SWARTZ CAMPBELL, LLC
BY: CURTIS P. CHEYNEY, ESQ.
(Philadelphia, Pennsylvania)

Counsel for Defendant

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P R O C E E D I N G S

(REPORTER'S NOTE: The following telephone conference was held in chambers, beginning at 3:30 p.m.) 10:00 a.m.)

THE COURT: Hi, this is Judge Jordan. Who do I have on the line?

MR. SPADARO: Your Honor, good morning. It's John Spadaro with my associate Philip Edwards from Murphy Spadaro & Landon for the Eames plaintiffs.

MR. CHEYNEY: Good morning, Your Honor. Curt Cheyney in Philadelphia and Nick Skiles is in Dover on a cell phone for Nationwide.

THE COURT: All right. We're on this call to deal with discovery disputes. In the first instance, Mr. Skiles, in case there is confusion, let me clear it up. The way the discovery dispute process is to work is if a discovery date is set for my handling of a discovery

dispute, I expect the papers to come in sufficiently in advance in accordance with the procedure that is set out in the order so that I can take a look at them without having to make a reminder call to counsel, which is what happened in your case yesterday. And the letters are to be three pages in length. Yours is a five-page single spaced letter. So are we on the same page now?

MR. SKILES: Absolutely, Your Honor. I apologize.

THE COURT: All right. Let's play this square all the way around. It makes things easier. Then I won't have to worry about getting letters like the one I got from Mr. Spadaro saying strike their response because it's two pages too long.

MR. SKILES: Certainly, Your Honor. Thank you.

THE COURT: Okay. Mr. Spadaro, I have read your letter. Do you want to take me to what you think is the most significant or salient parts of that, please?

MR. SPADARO: Yes, Your Honor. Thank you. Your Honor, the dispute involves two document requests from our April 7th initial document requests. It also involved Nationwide's refusal to comply with the Court's default standards for electronic discovery which were incorporated by reference as part of the March 28, 2005 scheduling order at paragraph one. Your Honor, an overarching issue that I

think will emerge as we discuss these issues is Nationwide's refusal to work cooperatively with us, refusal to communicate with us and to answer direct questions regarding discovery matters that are aimed at negotiating, either resolving or narrowing disputes.

THE COURT: Okay. I absolutely want to give you your chance to get into that. Before you do, though, I want to hit one question up front which I think is significant. The discovery that you have asked for, well, under the current scheduling order, discovery as to issues other than class certification is stayed, of course. I want you to explain to me how the things that you are specifically asking for here pertain to class certification, if you would, please.

MR. SPADARO: Well, Your Honor, class certification has its elements under Rule 23.

THE COURT: Right.

MR. SPADARO: One of them is numerosity.

THE COURT: Right.

MR. SPADARO: One thing these document requests were calculated to address was how widespread the practice is. That's not a chief purpose of them because I think we've addressed that, and I hope our certification brief shows we've addressed that more than adequately through our third-party discovery in the case of the insurance agents,

but issues like the commonality of the questions of fact and law when you've got, there is a lot of case law out there on Rule 23 about a widespread scheme to deceive in the marketplace that says discovery is required in a class certification case. We can't know if they have documents, a document, what kind of documents. We'd love to see that it's internal memos, it's minutes from a board meeting that says, you know: We don't want to sell PIP. Healthcare costs being what they are, we don't want to sell the product but we are mandated to. We have a lousy loss ratio on those products but the way to address that is to depress sales of PIP limits. And the way to depress sales is to have people believe either that they can't buy any more or that the $15,000 that they bought is the most they can buy.

Our complaint alleges directly that that is the consequence in the marketplace of telling people that they have full PIP limits when in fact you treat the transaction as a $15,000 limit. So these are documents that, if they exist, can only be gotten at through this kind of discovery.

This is not at all related to class certification discovery, but to answer the question indirectly, I would also point out if the objections were available, and that would be the objections you would want relief with, that would be the first time. It does not appear in their written responses. It was never raised by

Nationwide at any point in my communication with them trying to resolve the disputes. And it doesn't appear in Mr. Skiles' five-page letter either. So I think maybe the best indicator that we haven't run afoul of the stay of merits discovery is they haven't even raised that point.

THE COURT: All right. Now, you had other issues that you wanted to raise with me?

MR. SPADARO: Yes, Your Honor. Thank you. Your Honor, I know the nature of the case is known to the Court but, briefly, we're targeting Nationwide's practice of certain personal injury protection or PIP coverage to Delaware consumers and telling them in writing that the transaction is a sale of full PIP limits, in those words, when Nationwide is, as I said, treating the transaction of the sale of the minimum limits of $15,000 per person and $30,000 per accident. We contend that the practice is deceptive. And that it leads consumers to believe, as I have indicated, either that they purchased all they can purchase, either that they have more than statutory minimum or they have as much as you can get, although the statutory minimum is as much as you can get.

Nationwide repeatedly characterizes both in the context of this dispute where they're fond of saying this is a breach of contract case. And we have pled breach of contract but we also plead a violation of the Delaware

Consumer Fraud Act. The elements of that statutory fraud are important to the discovery dispute I think, Your Honor. And they're very brief. Any misrepresentation or omission in the sale and insurance product is actionable under the statute. You don't have to show scienter, for example. You don't have to show justifiable reliance. Any deceit, even if it's unknowing, any misrepresentation or omission in the sale to the consumer of the insurance product is actionable if it results in damage.

Why did Nationwide have the breach of contract count and why they did they not acknowledge there is a count under fraud? It's because they expected the parol evidence to work for them and against us, and specifically on this discovery.

They don't call it the parol evidence rule but they're essentially relying on the parol evidence rule in saying that we only get a copy of the contract because of references to PIP limits, not in what they say the contract is. And there is a dispute about that, too. But those references would be inadmissible at trial so they're invoking the parol evidence rule.

But the parol evidence rule actually works in our favor in this case because we will prove to the jury that Nationwide's use of this modifier "full" for PIP limits is made not only in documents outside the four

corners but is actually made in documents that are part of the contract, documents that qualify as part of the contract under principles of contract law and even under Nationwide's own guidelines for determining what is in and out of the contract. And we're going to prove all this at trial to the jury's satisfaction, if we're given a chance.

And if we're correct, Your Honor, that these representations are being made within the contract itself, then they are not parol statements at all. But if they were parol statements, and I think this is important, parol evidence does not bar proof of prior or contemporaneous statements in cases alleging misrepresentation or fraud. And we cite the Hynansky papers in our case, and Hynansky is a recent Chancery Court decision that collects other cases for this principle. It's a well established principle under Delaware law. So if consumers had been told by Nationwide they're purchasing full PIP limits, those representations are actionable whether they're in or out of the contract so long as they are misrepresentations because, Your Honor, Delaware law doesn't allow an auto insurer to trick consumers whether it's in the contract or outside the contract.

So on April 7th, we served Nationwide with three document requests, and two are disputed. Request number one asks for all documents.

THE COURT: You don't have to repeat this. I read your papers.

MR. SPADARO: I guess in summary, the first request asks for the documents that establish the practice is taking place. And the second request asks for documents that might discuss the practice like the hypothetical memo I spoke about before. And those are the types of documents we want in discovery.

Nationwide responded with its general objection. Now, the general objection is far more limited than what we see in Mr. Skiles' letter of yesterday. For example, the general objection -- and I'm being too narrow. Objections both specific and general that are stated in Nationwide's responses to the document requests do not include any reference to the requests being not limited in time, for example. That is something that has never been raised, was not raised in their written response to the requests and has never been raised in any communication from Nationwide to me in the negotiation process, such as it was.

THE COURT: Okay.

MR. SPADARO: It's an objection that was raised yesterday for the first time.

THE COURT: Mr. Spadaro, I really don't want to you repeat what is in your letter. You can state, however, things you want to highlight or emphasize with respect to

generally how the meet and confer --

MR. SPADARO: I'll try to do that. I wasn't in a position. When I wrote the letter, I didn't know they would raise new objections the day before the hearing so I did want to make the point.

The burden objection is another one. There is no burden objection in the responses. There is no burden objection communicated to me when they wrote to the Court.

But the general objection is this parol evidence objection, where they say the only legal characterization is what you see in the contract so all you get is the contract. And their position is that the only document we get in class certification discovery is what we regard as an incomplete copy of the policy. So why are they wrong about that, Your Honor?

THE COURT: You've got to stop and let me finish what I wanted to say to you; okay?

MR. SPADARO: Sure.

THE COURT: I've read your letter. I'm going to give them a chance to speak for themselves and I'll give you another chance to respond. But at the beginning of this --

MR. SPADARO: I'm sorry, Your Honor.

THE COURT: At the beginning of this, you said you wanted to point out to me how the meet and confers have generally worked or failed to work. That is what I am

interested in hearing from you now because I will be asking them about what their position is and I'll give you a chance to respond to it.

MR. SPADARO: Your Honor, I didn't catch everything you said. I think Your Honor is saying you will let them respond to the substance and then we'll get back to me on the procedural stuff.

THE COURT: No. If you need to pick the phone up, please pick the phone up.

MR. SPADARO: I will, Your Honor.

THE COURT: All right. What I said was I am going to give them a chance to characterize their own position before you characterize it for them and I'll give you a chance to respond, but what I'm still giving you the floor for now is at the outset of this discussion, you said "I want to also make the Court aware of how the meet and confers have failed to involve meaningful communication." I want you to get that on the table, too, because I'm going to ask them to respond to it.

MR. SPADARO: I guess then that Your Honor understands our position on the discoverability generally of these documents.

THE COURT: I think I do.

MR. SPADARO: Let me talk about the meet and confer issue. Your Honor, Exhibit E to our papers is my

May 11th e-mail to Mr. Cheyney. And in the May 11 e-mail, at this point we served responses, we served the requests. We've gotten the objection back, we've gotten a copy of what they say is the policy, and it's clear they're not going to give us anything more. So what do we do under Rule 37? You write and say we take exception and we want to try to work this out.

My May 11th e-mail on Exhibit E asks three simple questions: First question: Your Honor may have it before you. Has Nationwide searched all documents in its possession, custody or control that might reasonably be expected to contain characterizations of PIP limits as "full" --

THE COURT: I'm sorry. I have to interrupt you there, Mr. Spadaro. The court reporter who is here with me needs to take care an issue with his machine, okay? So I'll just ask you to hold silent here for a moment while he does that; all right?

MR. SPADARO: Sure. Thank you.

(Pause.)

THE COURT: Okay. We're back on line.

MR. SPADARO: Thank you, Your Honor. The three questions on the May 11th e-mail were, to essentially distill them: What you have searched for? The second question: Have you limited your search to insurance

policies only? The third question: Are you aware of any documents that exist that aren't insurance contracts?

So I'm asking them did you look for stuff other than insurance contracts or did you only look or did the lawyers get it, read it and say "you know what? We don't have to do anything. We'll give them a copy of the policy." And aside from that, can you tell me, you know, what do you know about the document population that exists? Is there anything there?

These are important questions because they can put me in a position to suggest compromises. If I know what is there, if I know how they can get at it, there could be follow-up discussions. Well, now you told me that you do have some minutes of board meetings, or you do have some memoranda or e-mails that might be responsive. How do you get them? How much time or money?

That leads me to the other reason why it's important to get answers to the questions. Because you pick up Skiles' letter and you learn for the first time they're arguing burden. Well, burden, generally burden is something that is required to be made with particularity. If they haven't even looked, if they don't know what they have, they obviously can't know whether there is a marginal burden or undue burden or something in between. But my questions were directed more to trying to anticipate what their concerns

were and try to narrow it down.

The three questions in that e-mail have never been answered. They never responded to that e-mail. They never told me "we looked." Yes, we looked for things other than insurance contracts. No, we didn't. Yes, we're aware there are responsive documents but we're actually withholding them. Obviously, you don't want to file an application targeted at counts that don't exist. If they don't exist; and that's number three, we don't have anything other than insurance contracts; we would have gone away. But none of those questions were ever answered.

So let's see. On May 16th -- now, this one is a little harder to find, Your Honor. At Exhibit H is a collection of letters. The fourth page is my May 16th e-mail and the first thing I asked there is can you respond to the question I asked last time in May 11th message, but I also asked in the May 16th e-mail -- again, it's the fourth page of Exhibit H.

THE COURT: I'm with you.

MR. SPADARO: I also asked: Would Nationwide be willing to make a production limited to generic documents, that is, not policyholder-specific documents? You see, we're not asking to produce 25,000 insurance contracts but the generic documents, the things that are not specific to any policyholder. For example, the types of documents like

internal memoranda, a memo to an agent about the practice itself, not specific to a particular policyholder. That question has never been answered. I don't whether they have generic documents and I don't know whether they're willing to produce them. I don't know how many they have. I don't know how many there are.

If you look at the e-mails more thoroughly, these questions about where the documents are, how they might be retrieved is something I raise again and again and I know nothing about. I know about their document retention practices indirectly through other litigation. I don't know anything specific to this dispute because none of those questions were answered.

THE COURT: Okay. I'll give you a minute or so to sum up on this point.

MR. SPADARO: Okay. Your Honor, I think I used that last minute to talk about the default standards because it's so closely related to what I just raised. At Exhibit H is the full collection of.

I wrote to them on March 8th, asked them to comply with the default standard. They never answered that letter.

A month later, on April 6th, I asked again. They ignored me.

A month later, on May 5th, I asked again. They

ignored me.

I wrote again on May 16th. Final answer, ignoring us, Mr. Cheyney wrote back and said there is no electronic discovery you requested. And I pointed out in my letter, definition number three of our document requests specifically targets documents stored or created electronically. And I can tell Your Honor, this is Nationwide. It's a hundred billion dollar insurance company. Most what they have is on the hard drive. They can produce it in hard copy. But in terms of finding it, retrieving it, most of it is on the hard drive. They did almost all their business on the PC on the claims side.

THE COURT: Okay. I have your position.

MR. SPADARO: Thank you, Your Honor.

THE COURT: All right. Mr. Skiles, Mr. Cheyney, who is speaking on behalf of Nationwide?

MR. CHEYNEY: If I may, Your Honor I will.

THE COURT: And you got to identify yourself.

MR. CHEYNEY: I'm sorry. Curt Cheyney.

THE COURT: All right. Go ahead. And I want to you speak in order first to the substance of the discovery dispute. And you do not need to repeat the substance of Mr. Cheyney's five-page letter but if there is something you wanted to add or highlight or emphasize, that's fine. And then I want to you speak to the process of discovery, having

heard what I just heard about you folks supposedly ignoring efforts at reaching a meaningful meeting of the mind about discovery. Go ahead.

MR. CHEYNEY: It's my letter, Your Honor, and I apologize for the extent of it. Nothing needs more to be said about that. Accept my apologies, please.

We don't think there is a discovery dispute. The interrogatories were so broad and general, requests so broad and so general, we answered them and we believe that is our answer and that is our view. This is not a discovery dispute. If he wants to ask additional discovery, he wants to take depositions, that's his purpose and that is his design,, but we don't have to have a modification of interrogatories or requests or production of documents for which we don't get a chance to either answer or object to or otherwise raise questions through the normal process. I don't think the discovery dispute conferences are a vehicle for modifying discovery that has already been in and answered.

THE COURT: Well, hold on, Mr. Cheyney. Let's explore that position. The assertion is made that you were asked for all documents that refer to or characterize the limits of liability for PIP coverage as "full" and that they got something from you which indicates that they believe can't possibly cover the waterfront. So they're asking and

did ask, "look, tell us, did you confine this search in some way? Speak to us about what you did so we understand what happened." That's what your opponent is telling me happened. Is your only response to that we gave them an answer and we don't ever have to do anything else?

MR. CHEYNEY: No, we gave them a relevant answer because discovery is supposed to be for relevant information. The relevant test would be in the context of this pre-certification, it's actually still pre- or Rule 12(b) motion to dismiss, and our position is that the only relevant document that characterizes the PIP limits is the policy, including the declarations page. There is no other. In fact --

THE COURT: And what is the basis? What is the basis of that position, Mr. Cheyney? Because you don't have the option of playing games with me the way I'm beginning to sense games were being played with the other side. I want to know -- Stop. Do not speak over me -- I want to know the answer to the question that was put to you by Mr. Spadaro. Is this a position, a legal position that we're giving you the contract and nothing else because that is our view of relevance?

MR. CHEYNEY: That is our view of the entire search within the underwriting file. That is our view of the legal position and relevance of the questions that are

presented in the complaint.

THE COURT: All right. Then I think we'll be able to make pretty short work of that. Is there anything else with regard to the substance of the discovery dispute that you want to discuss?

MR. CHEYNEY: Yes, we still have objections pending.

THE COURT: Okay. What are they?

MR. CHEYNEY: The objections go to the overbroadness of the scope of the request. The objections go to this is discovery before the 12(b)(6) motion is decided or ruled upon or answered and we have provided other answers and documents in our 26(f) disclosure.

THE COURT: All right. Is there anything else?

MR. CHEYNEY: Your Honor, our objections are as I said they were, and it's burdensome. Our obligation is to produce relevant documents and we have.

THE COURT: What is the burden?

MR. CHEYNEY: The issue of classification. I'll stop. You were talking.

THE COURT: Yes. What about burden? The assertion is made you haven't told them anything about the scope of the search that would be required to go beyond this claim file and, therefore, you're not really in a position to say anything about burden or at least you haven't said

anything about it. Is there something more you want to say about it here?

MR. CHEYNEY: These are the documents we saved or recently accessible documents related to the sale of a policy?

THE COURT: This document.

MR. CHEYNEY: All documents, generic documents aren't even referenced in the complaint, aren't attached to the complaint that Mr. Eames even saw or could have been misled on. Remember, class actions are not for fraud cases. That's the unique part of the misrepresentation, a reliance of specific damage. That is not a class action case. This is a policy and the policy is what we have pled as our defense and if the word full is not even in the policy. There are no documents that relate to the policy description of the word "full," period.

Looking for generic documents is unreasonable. It's expensive. It's burdensome. It's time consuming. It's not even limited in time as to what the scope is. It's not limited to the State of Delaware. From the face of the interrogatory request, the Court can see that.

THE COURT: All right. Talk to me about the process of discovery then. The assertion is made that these are all things that you could have said to them that would have led to some negotiation perhaps about, okay, if it

doesn't say Delaware on the face of the interrogatory, just give me Delaware, or if you think this time period is too broad, unbroaden it, then let's talk about a reasonable time period. But that discussion never occurred because you wouldn't respond to their e-mails or letters. Do you have a response you want to give me now not to what they asked but to what they say you failed to do?

MR. CHEYNEY: Well, I will say that on a personal level, and I will speak specifically then, it is hard to speak to Mr. Spadaro. It invites a letter back. For instance, I did write and ask for what would be a protocol for a word search? And he said we can't do it. In fact, in his letter he said we can't do it. I want to know everything you have and I am looking for generic documents that probably aren't relevant and could be relevant.

Searching board minutes for a document that has the words "full" and "PIP" in it somewhere involves confidential information, it involves claims files, attorney-client privilege. I can't agree with him on everything and still protect my client's interest. And just yesterday, I tried to work with him and I got a letter accusing me of extortion. I can't be responding back and forth and getting letters that go nowhere. In fact, one of the early letters from this point he said we are so far apart it's amazing.

THE COURT: Well, I've got to --

MR. CHEYNEY: Our differences are profound.

THE COURT: Well you know what? I've got to agree, you guys are so far apart. I excuse not for a moment anything Mr. Spadaro might have said in the way of heated rhetoric accusing people of extortion; which, of course, Mr. Spadaro, you will have a chance to answer for in a moment; but that doesn't excuse an unwillingness to at least discuss or offer some kind of a meaningful chance to meet and confer about what is going on in respect to a discovery request that has come to you.

So I'm pretty sure I understand what is going on here, which is I've got lawyers that can't get along. I've got lawyers that find each other's personal styles off putting and difficult to address and deal with. And I intend for us to move past that.

So Mr. Spadaro, do you want to respond to the assertion.

MR. CHEYNEY: Might I finish with one point?

THE COURT: Sure. Absolutely.

MR. CHEYNEY: On May 12th, I wrote to Mr. Spadaro: "John, I have forwarded your request to Nationwide's counsel and suggested a substantive response. If possible and feasible, can you suggest a protocol for a document sweep? What word order or phrase might you

suggest. I don't want to go through every PIP, MedPay, BUIM and feret out any offhand comment by an adjuster that might use "full" referring to the available PIP limit stated in the policy while considering a claim and making a claim log entry; after all, no claim adjuster's comment has relevance to the insured's state of mind when purchasing the policy."

The response is we want to know everything. That I can't give you that search parameter. Tell me generically what might be in your Board of Director minutes. I can't believe the court would want me to search Board of Directors meetings that have no relevance to Mr. Eames and before we even decide a Rule 12(b)(6), but that is up to the Court to go that way. I just had a 12(b)(6) motion that has been outstanding for nine months not even answered and I don't even know what if the word "full" has any relevance to this case at all, let alone do a sweep of e-mail, claim files, rate files, everything. I just think that that is beyond reason, Your Honor, and it's certainly not a search for relevant information.

THE COURT: All right. Mr. Spadaro.

MR. SPADARO: Your Honor, I guess there are four or five points, if I may be permitted. I'll try to do it as quickly as possible.

THE COURT: Yes. And I want you to start, I'm

telling you to start with the assertion that it's hard to talk to you because you make it difficult because of the language you use in response.

MR. SPADARO: I would like to start with that. And I think, Your Honor, if Your Honor can remember back to our prior appearances --

THE COURT: Boy, do I.

MR. SPADARO: -- this always happens. That if we're alleging some legal issue, their response is John Spadaro is a bad guy. Invariably, that is their response. All I can say, Your Honor -- I'll say two things. First of all, what happened this week was appalling. It was appalling and it was completely outside the norms of Delaware practice. And I was not going to raise it with the Court but now I'm be attacked personally once again.

Now, Your Honor knows the case has been stayed. We filed the motion. We do everything by the book. We filed the motion. We didn't just ignore their motion to dismiss, we actually filed an affirmative motion that is on the docket asking that it be deferred until the jurisdictional issues were sorted out. And I think everyone on the call understands the logic of that, especially since Nationwide asked us to stay the case and move to stay the case, the entire case, including their motion to dismiss while those issues were sorted out. But we -- I'm not sure

what that beeping is. I'm not sure if the Court hears it. We heard the motion to defer their notion pending outcome on the jurisdictional issues. They never responded. That motion was unopposed. So that was the state of play. That was the state of play until the stay was entered. There was never a procedural obligation for you to respond to their motion and they actually proposed the stay and asked the Court to stay the case.

The stay has recently been lifted. Within a few days of the stay being lifted, I wrote to Mr. Cheyney and proposed a briefing schedule for his motion to dismiss. I proposed that we answer on August 22nd and that they respond, I think the date was September 12th or September 14th. Mr. Cheyney wrote back and said, well, that gives you an extension and we're not giving you an extension.

Now, I know we're not in state court. The Supreme Court Rules incorporate the Delaware principles of lawyer conduct which say it's uncivil and unprofessional to deny a party a reasonable extension. In other words, Mr. Cheyney's position was under the local rules I had two weeks from the lifting of the stay and that's it -- two weeks during summer months when I had family vacations, I had other obligations and I proposed to counsel what is an eminently reasonable stay date and I'm telling him I'm going

to answer your motion, your case dispositive motion in a couple weeks in the month of August. He did not come back and say here are alternative dates. He just wrote back and said, what he said to me was this: You drop your discovery demands and cancel this call and withdraw your document requests or we won't give you an extension. And I told him I was not going to allow the class discovery to be extorted from them over an extension of the briefing schedule. And I told them that was, I told them that that was outside the bounds of normal practice among Delaware lawyers.

And I realize Mr. Cheyney is not a Delaware lawyer. But that is what happened earlier this week, and I do not apologize for my reaction to. I've rarely had lawyers in a complex case or even in smaller cases refuse to extend a modest extension to a briefing schedule on a motion that they stayed for several months.

THE COURT: All right. Move to your next point.

MR. SPADARO: All right. Now, let's get more specific. Exhibit E has my questions. Did you search for just insurance contracts or have you searched for other documents? Where are the documents? What is the nature of the search you have done?

Their position is that I am such an evil person that that question can't be answered. And I think that you know that is about as lacking in merit as anything I have

heard in court. Whether they like me or not, when I ask have you restricted your search to insurance contracts or have you done a broader search, would you be willing to consider a production of generic documents, those questions are capable of being answered. If the answer is no, lawyers disagree. That is what the litigation process is for.

THE COURT: Okay. Then respond to the assertion they make that Mr. Cheyney says I reached out to Mr. Spadaro. I said to him, hey, do you have any ideas about a word sweep? What is your reaction that your response was no, our response is we want everything, period.

MR. SPADARO: No, that was not my response, Your Honor. And this is empirical. We don't feel it's objective. It's Exhibit H, the fourth page in my May 16th response. And here is my response to the suggestion of a document sweep. And I think I also addressed this in my letter. But I say in the second paragraph, in my May 16th e-mail: "But that aside -- and that that is our idealogical disagreements -- it's difficult to frame the search terms when I don't know what your search capabilities are." This is why I need them, to anoint the discovery liaison and who can tell me what kind of hardware and software. You know, they can bring tools to this that I can't even imagine.

I continued. "My law firm's document management software could search 'PIP' within 10 words of 'full,'

'protection' within 10 words of 'full,' et cetera, and this capability could make for a very manageable search. Nationwide is obviously more high-tech than my six-lawyer firm, and may have search capabilities far beyond those that I might propose.

"On a related point, I have written to you repeatedly Nationwide's failure to comply with the Court's Default Standard for Discovery of Electronic Documents, as required under Section 1 of the Scheduling Order."

THE COURT: All right.

MR. SPADARO: If Nationwide would simply comply with the standard, you might be better able to work through document-search issues."

Now, that is a drop dead response. That is saying well, look, here in my firm response.

THE COURT: Okay. I got you, Mr. Spadaro.

Mr. Cheyney, I want you to -- now, you see, because you folks apparently are incapable of speaking civilly to each other, I'm asking you now to respond to what Mr. Spadaro says he said to you, which was not "no, forget it, I want everything," it was an invitation for you folks to speak in more detail about search capabilities, which you evidently did not respond to. So what is your answer to that? What did you say in response?

MR. CHEYNEY: I didn't respond. I said in my

Answers to Interrogatories. If I could, please, Your Honor, go back to what the dialogue was in response to the questions about my abuse of privilege or my abuse of courtesy?

THE COURT: Sure.

MR. CHEYNEY: We gave him every courtesy from the beginning. We didn't require an answer to our motion. We agreed to a stay. We agreed to everything. And when the Court remanded the matter, I wrote to him and said now let's focus on the motion to dismiss. He then wrote, suggested a scheduling of August 22nd, September 12th. I didn't say no. Then he introduces the discovery dispute. And this is what I said. And it's only one paragraph, five sentences.

"In light of your discovery dispute, Nationwide is not willing to extend your response time for our motion to dismiss. This motion to dismiss was filed timely, has been outstanding for many months during which you had more than ample time to formulate a response. Accordingly, we will ask the judge to require the plaintiff to file their response to the pending dispositive motion and abate all discovery against Nationwide (including the informal Motion to Compel More Specific Responses to Interrogatories and Requests For Production of Documents) until the Motion to Dismiss is decided by the Court. Of course, we hoped you might agree to this; but should you agree, then we can extend the time for filing the Answer to the Motion to

Dismiss."

I never said drop, abandon, forget your discovery dispute. I just said August 22nd is fine. I never said he could have the extensions, I never said he couldn't have an extension. All I said is before we know what the word "full and the relevance of the word "full" is, our motion to dismiss should be heard because that will determine whether "full" has any relevance and I'm only obligated to review and view discovery requests in the context of relevance and answer what is relevant information.

One other point. If there is information that he learns about, nongeneric, relevant information that deals with Mr. Eames' complaint, if there is information that is relevant that I didn't answer, then he has sanctions, but this is a search for a hypothetical nonexisting potential search for a negative which I think is unnecessary but I never extended.

THE COURT: Stop, Mr. Cheyney. Answer me this. When you say it's not relevant, it's proving a negative, if the question to you is -- and I put this in the context of class certification discovery. If the question to you is, look, I want to know what sort of discussions or internal memoranda or other information there is that would shed light on how Nationwide, itself used these terms and understood them, your position is that it just isn't relevant to

this case; is that it?

MR. CHEYNEY: Correct. Communicated to the plaintiff. The plaintiff has to have a misrepresentation made to him that he relies upon to his detriment. It has nothing to do with what I said to myself walking down the hall in the office or at a board meeting.

THE COURT: All right. Good enough. I got your positions. Now I have some rulings for you and I hope you all are listening very carefully.

First, we'll deal with the briefing. You've given them the extension they want. It isn't unreasonable. And despite what you are telling me, Mr. Cheyney, this was I think a pretty solid example of you saying, no, we're not going to answer, unless you withdraw your discovery, we're not giving you an extension. It was a poor trade to offer. But in any event, you're out of luck on that. They've got their extension.

On briefing, you guys come to a reasonable agreement on that schedule. And if you can't agree with it, I'll just make it easy.

MR. CHEYNEY: I agree.

THE COURT: The proposal that was made is sensible. That's the briefing schedule. Get it done.

Second, you may think you can't believe that I would have you respond to discovery until your motion is

decided but you would be mistaken, Mr. Cheyney, because this court does not operate on the principle that the filing of a motion to dismiss stops discovery in a case. If that were the principle upon which we operated, cases would grind to a halt across the board because everybody thinks that their case is one that is so important it ought to have the dispositive motion decided right up front.

It's a little bit of an exaggeration, not everyone but a very, very large percentage including people just like you who think you know what? My case ought to be heard on the merits of the pleadings right now because if only you, judge, were in tune enough to see our point of view, we wouldn't have the expense of discovery. It would definitely be a better world if the press of work in the courts across the country were such that every person who wanted their issue heard first could have it heard first.

But that isn't the way it works. The way it works is you file your motions if you think you have something. If there is an extraordinary case where you think it is so important that no other discovery can happen while this is going on, then we take a look at that.

And in fact, in this case, merits discovery was stayed and class certification discovery was allowed. And the other side has made what I think is not an unreasonable request for information associated with the claims in their

complaint. You may not like it but that doesn't make it "irrelevant." It also doesn't make it outside the bounds of proper discovery.

So what I'm telling you is if it comes down to advocacy before me on those discovery dispute, you come up way short, mister -- way, way, way short. The record that looks like has developed here that is presented to me is basically one where you said I'll give you the document. I'll give you the contract. Otherwise, you can drop dead until my 12(b) of is decided. That is sort of the gist of the feeling or the communications that seem to be going back and forth. And I'm just trying to disabuse you of this in the most direct, clear, emphatic way I possibly can. I will not tolerate that.

If you've got an issue with discovery, your obligation is to sit down and discuss it with the other side. And if Mr. Spadaro is off-putting, he is off-putting, but get past it. And if you need to collect a batch of letters and a history of anecdotes about how Mr. Spadaro is over the top so he can come to me and say he is abusing the process, do it and I'll hear you. But I can tell you now, both sides, if I have to spend an hour with you sorting out who is more obnoxious which is what at least half this call was about: "He is bad, he is mean, he is nasty, he hit first," I'm going to end up leveling sanctions at you

because that is not what the litigation process is about and I won't let you make it about that. You have real clients with real money at stake, real interests on the line and they don't care about whether you guys like each other, and I don't care whether you guys like each other.

So get over yourselves and get past the emotion here, please. You should be sitting down. If one side says you have a meaningful dispute about what bounds of relevance are, the way to do it is to say "we just don't think that is relevant until our 12(b)(6) motion is decided. Let's take it to the judge." You bring it to me. Then I would say to you, "well, I disagree." You know, if this tends to go to the certification issues, there is a reasonable likelihood that it would lead to admissible evidence or it goes to that issue in another way, that, under the broad rules of discovery, it's not inappropriate for them to have that information, I'll tell you I disagree with you. But what I will not have is "I won't talk" or "I won't respond" or you know, or "I didn't want to write letters because every time I responded to him, I get back a letter I don't like." You've just got to get over that.

And, Mr. Spadaro, I hope you get over what apparently your opponents say is a knee-jerk reaction to every response they give you to being some accusatory letter back. And don't say I don't do that because I'm not hearing

you having to defend yourself. I'm just telling you I'm sure, I'm positive, given the level of rancor apparent from you folks and has been from the start of this case, that there is blame to go around.

So go look at yourselves in the mirror, stop trying to figure out how to best the other side, adjust your professional demeanor and start acting in the way with people who are officers of the court.

Now, here is the short of it. The briefing schedule, it's as Mr. Spadaro suggested. The discovery, you are to make a good faith effort at a meet and confer and your positions to date have been inadequate and inappropriate. And this is not going to wait until the 12(b)(6) is decided, Mr. Cheyney. You give a substantive response.

As to discovery on the electronic default standard, if you guys can't come to an agreement, default standard means just exactly that. And saying, well, there is no discovery that is electronic here is just flat inaccurate.

You make a statement in your letter which in find to be genuinely remarkable:

"Generally speaking, the 'federal courts' use the expression 'electronic discovery' to refer to the method of production of discovery, not necessarily to the form the

documents are created or stored."

Well, you know, I think you are just wrong on that and I think if you read the default standard, you'd understand we're not talking about the method of delivery, we're talking about searching electronic databases for relevant information. So it's a default standard because if you folks can't talk to each other, it's what kicks in.

So you are not at liberty to say "I don't care how many times they say they think we've got relevant documents in our electronic database, I say there is no electronic discovery." That approaches the level of an almost willful refusal to acknowledge what is on the face of their document. I repeat, you may not like what they ask for, you may feel like you have an opportunity or obligation to come to me and said, "judge, it's overly broad, it's burdensome. Let me tell you about the kind of electronic discovery we're talking about doing here and the money it would cost." I'm not telling you that you are cut off from any of that.

Cost shifting associated with it in an appropriate case, I'll look at any of the Subelocki (phonetic) factors that are well known now in the practicing bar. This is not a new subject area so please don't try to tell me that electronic discovery just means do I give it to you in a disk or hard copy. In 2005, that is definitely not

what it means.

Okay. Now, I've been on a soliloquy for awhile but does everybody understand what I ruled?

MR. SPADARO: Your Honor, John Spadaro again. I you have ordered us to meet and confer now. I understand that. I don't want to try to rewrite the transcript but I understand that to mean that you feel that in broad strokes, discovery we're seeking should be had, although we may need to narrow it in a reasonable way through negotiations. And if that is what the Court instructs, we're going to do what the Court tells us to do.

Is that a fair summary of where we are in terms of where we are? Because obviously we're meeting and conferring for a reason. I don't want to run up against counsel saying -- I'm not saying they would take those position but I have to anticipate what might be. They would say, well, the Court never blessed your discovery at all. Go ahead.

THE COURT: Hold on, Mr. Spadaro. Mr. Cheyney, do you understand what I asked you to do, sir?

MR. CHEYNEY: Yes, sir.

THE COURT: Okay. Mr. Skiles, are you there?

MR. SKILES: Yes, Your Honor. I am.

THE COURT: Do you understand as well?

MR. SKILES: Yes, Your Honor. I do.

THE COURT: All right. You know what? Mr. Spadaro, these are smart men on the other side. And I think I have been more explicit and more direct and emphatic than I've had to be in a long time with counsel in any case so I trust that you and they will take the import of my words and manage your discovery appropriately. Go back and look at the transcript and figure it out. And if you guys can't figure it out, at that point I think we'll be stepping it up into the realm of sanctions because I am not going to spend another call like this. And I am confident that based on what I have already said, people can understand and move forward.

Now, let me hasten to add I'm not saying there is going to be some automatic sanction flying around if there is another call. If there is a genuine good faith dispute you can't get past because I have given you statements that are more general than are needed for you to really wrestle with a fine point, I'm happy to help you. What I'm not happy to do is to deal with generalized stuff about, no, I think that nothing should happen until my dispositive motion is decided. What I'm telling you is that does not fly. That the notion of get us the documents to deal with the issues that deal with whether they think that is going to be in or out of the case, at this point it's in the case based upon the allegations and I'm saying come to

some sensible way to address that. So I think actually I've said enough.

MR. SPADARO: That was helpful, Your Honor. Thank you.

THE COURT: I trust you folks will get this worked out. And I'm hopeful the next time I'm dealing with you folks, it will be either in court at oral argument or at a trial, if it gets that far, or to sign whatever settlement agreement you get to, if miraculously people work it out. But what I hope not to have to do is to have another conversation with you folks that is on a personal level. That ought not happen again.

All right. Let's go to work and get going on the merits, folks.

MR. SPADARO: Thank you very much, Your Honor.

MR. CHEYNEY: Thank you, Your Honor.

MR. SKILES: Thank you, Your Honor.

(Telephone conference ends at 10:50 a.m.)